Supreme Court, U.S.
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92-514 NO.

In The
Supreme Court of the United States

OCTOBER TERM, 1992

ST. TAMMANY PARISH POLICE JURY,
Petitioner

v.

INSBROK, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 24, 1992.

QUESTIONS PRESENTED FOR REVIEW

1. Does an Erie-bound federal Court of Appeals have the freedom to decline to follow the holding of the highest court of a state which has decided the issue in a case, after acknowledging that holding?

2. Can a federal Court of Appeals follow a state's lower appellate court by determining that a state's lower appellate court was correct in limiting a holding of the Supreme Court of Louisiana?

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5. *Hebert v. Guastella*
409 So. 2d 375 (La. App. 4th Cir., 1982)

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1. La. Civil Code Article 2045

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is not reported and appears as Appendix A hereto. That Opinion partially reversed and partially affirmed the judgment by the district court. The case was then remanded to the district court. The opinion of the district court, not reported, appears in Appendix B hereto.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 24, 1992.

Petitioner made no application for rehearing and this petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254 (1).

STATUTES INVOLVED

1. La. Civil Code Article 2045. Determination of the intent of the parties

Interpretation of a contract is the determination of the common intent of the parties.

Acts 1984, No. 331, §1.

2. La. Civil Code Article 2050.
Provisions interpreted in light of each other

Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole.
Acts 1984, No. 331, §1.

—

3. La. Civil Code Article 2051.
Contract worded in general terms.

Although a contract is worded in general terms, it must be interpreted to cover only those things it appears the parties intended to include.
Acts 1984, No. 331, §1.

STATEMENT OF THE CASE

1. The respondent, TITAN HOLDINGS, INC. D/B/A/ INSBROK, AND TITAN INDEMNITY COMPANY (who collectively refer to themselves as INSBROK), filed suit (under diversity jurisdiction, 28 USC, §1332) against the petitioner ST. TAMMANY PARISH POLICE JURY seeking reimbursement of monies advanced as expenses and attorneys' fees as well as loss payments made to claimants in accord with the provisions of seven policies on insurance issued to the Policy Jury.

2. In accordance with the provisions of 28 USC 636 (c), the parties waived their right to proceed before a Judge of the United States District Court and consented to have a full-time United States Magistrate conduct the trial of the case and entry of final judgment.

3. The Magistrate found as a matter of law that respondents, are entitled to reimbursement of the deductible portion advanced on each claim which encompasses the indemnity payments and claims expenses including attorney's fees.

4. Judgment was entered on April 28, 1991 in favor of the respondents, TITAN INDEMNITY COMPANY, and against the petitioner ST. TAMMANY PARISH POLICE JURY, declaring that respondents are entitled pursuant to the provisions of the seven policies of insurance issued to the petitioner POLICE JURY by the respondents, to reimbursement of the

deductible portion advanced on each claim, which encompasses indemnity payments and claims expenses, including attorneys' fees in the sum of NINETY FIVE THOUSAND FIVE HUNDRED SIXTY NINE AND 23/100 ($95,569.23) DOLLARS with interest from date of Judgment at the Federal rate of interest until paid with costs to be paid by the petitioner.

5. Petitioner filed its Notice of Appeal on May 6, 1991.

6. Petitioner simultaneously filed with its Notice of Appeal, a Motion for Stay of Execution Pending Appeal.

7. Petitioner sought a stay without posting a supersedes bond pursuant to the Federal Rules of Civil Procedure Rules 62(f), which provides that a Judgment Debtor is entitled to a Stay according to State Law.

8. On May 13, 1991, the United States Magistrate denied Petitioner's Motion to Stay without bond.

9. On May 24, 1991, petitioner/appellant filed a Motion for stay of Execution Pending Appeal in the Fifth Circuit Court of Appeals.

10. On May 31, 1991, the Fifth Circuit Court of Appeals granted petitioner's motion for stay pending appeal.

11. On June 24, 1992, the Fifth Circuit Court of Appeals entered judgment reversing the trial court's judgment in favor of respondent as to claims and

attorneys' fees, but affirming the trial court's judgment in favor of respondant as to loss payments. The Fifth Circuit Court of Appeals then remanded the case to the district court to determine whether or not petitioner was entitled to all or part of its attorneys' fees in the district and appellant court.

12. Within 90 days of the Fifth Circuit's judgment the petitioner brought this action requesting certiorari.

REASONS FOR ALLOWING THE WRIT

Summary

The Fifth Circuit Court of Appeals recognized the holding of the Supreme Court of Louisiana in *Employer's Surplus Lines Insurance v. City of Baton Rouge*, 362 So.2d 561 (La. 1978), yet disregarded it in favor of their interpretation of a lower court's opinion, *Hebert v. Guastella*, 409 So.2d 375 (La. App. 4th Cir. 1982). Under the Erie Doctrine a federal court in a diversity action is bound to follow the substantive law of the state in which it is sitting whether that law be legislatively declared or a decision of the state's highest court. *Erie v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188. There are no issues of fact raised in this application.

Argument Amplifying The Reasons:

The Fifth Circuit Court of Appeals acknowledges that they are an Erie-bound court but stopped short of applying Erie to all of the issues in this case. The Fifth Circuit did not follow the ruling of *Employer's Surplus Lines Insurance v. City of Baton Rouge* in which the Louisiana Supreme Court held that absent a judgement or consent by the insured, the insurer is not entitled to reimbursement of his deductible because the claim is not one for which the insured is "legally obligated" to pay. *Employer's*, 362 So.2d at 564-565.

Under the Erie doctrine, a federal court sitting in a diversity case is bound to follow the substantive law of the state in which they are sitting whether the law be declared by the legislature or the **state's highest court.** *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188. Therefore, the Fifth Circuit Court of Appeals was bound by the ruling of the Louisiana Supreme Court in *Employer's*, supra.

The holding of the Louisiana Supreme Court in *Employer's*, supra, is clear:

> *Absent such a final determination of the insured's legal obligation to pay by a court of law, the insurer would not be entitled to reimbursement.* On the other hand, if the insurer settles the claims of third persons against the insured, as in the instant case, the insurer would be

> entitled to reimbursement from the insured *provided the insured consented to the settlement agreement*.
> (emphasis added)
> *Employer's*, 362 So.2d at 564, 565.

The Fifth Circuit's analysis of *Employer's*, supra, is faulty in several respects. That decision of the Supreme Court of Louisiana establishes a general rule of law and is not confined to the specific language of the policy at issue in the case as suggested by the Fifth Circuit (see Appendix A: Judgment of the United State's Court of Appeals, page A-1); rather the Louisiana Supreme Court interpreted the language of an insurance policy containing a clause granting to the insurer an unrestricted right to settle claims without any approval of the insured and its effect upon the insurer's contractual right to enforce an obligation of the insured to pay the deductible amount stated in the policy.

In *Employer's*, supra, the Louisiana Supreme Court was not addressing the sequence in which the language appeared in the specific insurance policy. They were discussing the *obligation* created by the insurance contract. The Court was addressing the Napoleonic Code and Codal Articles therein dealing with the well-defined area of Law known both in civil practice and law school curricula as "Obligations".

In *Employer's* the Louisiana Supreme Court determined that the obligation created by the language in the insurance contract was that its insurer was only contractually bound by an insurance policy to pay a final judgment against its insured. The Insurer did have the absolute authority to settle; however, the insurer's right to reimbursement of the deductible was 'conditioned upon the insured becoming "legally obligated" to pay . . .' *Employer's*, 362 So.2d. at 564-565.

Thus, if the insurer, for reasons of its own, did opt to settle without a final judgment, the insured would not be obligated to pay the insurer the deductible portion because without a final judgment neither the insured nor the insurer were under **any** obligation to pay **anything**. The obligation of the parties imposed by the language of *Employer's* is the same as the obligation imposed on the parties by the language of the policies issued to petitioner. Therefore, the contractual obligation which the parties intended and imposed upon themselves by the language of those insurance policies is the identical obligation interpreted by the Supreme Court of Louisiana in *Employer's*.

The rationale for the rule announced in *Employer's* is easily shown. If a policy of insurance contains both a clause granting to the insurer an unrestricted right to settle claims without any approval of the insured, as well as a clause granting a right to the insurer for reimbursement of the deductible, any claim filed im-

mediately becomes an "open checkbook" for the insurer to use, without risk, up to the amount of the deductible. *Employer's* makes it clear that policy clauses which grant an uncontested right on the behalf of the insurer to settle will be enforced. But, in order to protect against the "open checkbook" which would naturally follow from a policy which also contains a deductible clause, *Employer's* prevents the insurer from collecting its deductible amount if it has neither proceeded to judgment nor secured consent from the insured for the settlement.

Furthermore, logic dictates that when the insured signed the insurance contracts in *Employer's*, and in the case at bar, they could not have intended to give the insurer an "open checkbook" in regard to the deductible portion. The Louisiana Supreme Court recognized this by their decision in *Employer's*. Louisiana Civil Code Article 2045 states:

> Interpretation of a contract is the determination of the common intent of the parties.
> La. Civil Code Article 2045.

So if the insured did not intend to give the insurer an open checkbook in regard to the deductible portion there would not be "common intent" and the contract should be interpreted accordingly.

Thus, *Employer's* establishes a general rule governing the obligations owed by an insured to its

insurer when there is no final judgment against the insured. *Employer's* states that the insurer is not obligated to pay unless there is a final judgment against the insured. Where an insurer settles without a final judgment against the insured, the obligation of the insured for the deductible portion does not exist under the contract of insurance unless the insured had consented to the settlement. The ruling in *Employer's* is rational because it prevents the "open checkbook" situation which the parties surely did not intend when they signed the insurance contract.

However, even if *Employer's* was confined to the specific manner in which the language was presented in the insurance contract, *Employer's* would still apply to the case herein because the Fifth Circuit committed manifest error in their *de novo* review of the insurance policies when they failed to recognize the clear language of the policies at issue, which is identical.

The policy in *Employer's* contained a specific deductible endorsement which was clear and quoted by the Court, as follows:

> "The sum of $10,000.00 shall be deducted from the total amount of all sums which the Insured shall *become legally obligated to pay* by reason of bodily injury or property damage claims, including hospital, medical and funeral charges and all sums

> paid as salaries, wages, compensation, fees, charges and law costs, premiums on attachment or appeal bonds, interest on judgments, expenses for doctors, lawyers, nurses and investigators and other persons, and for litigation, settlement, adjustment and investigation of claims and suits which are paid as consequence of any occurrence covered hereunder . . . "
> (emphasis added)

In the case herein, the insurance policy supplied by plaintiffs also defines those claims which they agree to pay. In Section I - Coverages, the following language appears:

> 1. Insuring Agreement
>
> a. We will pay those sums that the *insured becomes legally obligated to pay* as damages because of bodily injury or property damage to which this insurance applies.
> (emphasis added)

This language is essentially identical to that which triggers the payment obligations discussed in *Employer's*. Because the coverage applies only to claims which the insured becomes "legally obligated"

to pay, any settlement of claims without judgment or concurrence by the insured results in the loss to the insurer of any claim it may have had against the insured for the deductible amount.

In summary, *Employer's* establishes a general rule to be applied when an insurance policy contains both a clause granting the insurer an unrestricted right to settle claims, and an obligation for reimbursement of the deductible. Further, even if *Employer's* was specific to the language of the policy in question, it would apply to the case at bar because the language in the policies is identical, although grammatically appearing in a different sequence.

However, the error of the Fifth Circuit Court of Appeals was not confined to their erroneous analysis of *Employer's*. The federal appellant court also erred because they relied on *Hebert v. Guastella*, 409 So.2d 375 (La. App. 4th Cir. 1982), to support their decision.

First, the decision of a state's appellant court is not binding when there has been a decision to the contrary by the state's highest court.

> However, when there is a decision of the state's highest court which conflicts with the ruling by the lower state court, a federal court is not obligated to follow the law as interpreted by the lower court.

Williams v. General Motors Corp., 393 F.Supp. 387, 394 (D.C.N.C. 1975), affirmed 538 F.2d 327 citing *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 178, 61 S.Ct. 176, 83 L.Ed. 109 (1940), *Gooding v. Wilson*, 405 U.S. 518, 525 n.3, 92 S.Ct. 1103, 31 L.Ed.2d 401 (1972).

Thus, following the precedent established in these cases, the federal appellant court was not bound by the decision of the state appellant court because the Louisiana Supreme Court had already decided the issue. Accordingly, *Hebert* does not establish binding precedent upon an Erie-bound federal court because it conflicts with *Employer's*.

Second, the Fifth Circuit committed an error of law when they failed to recognize that the issue before the court in *Hebert* was not the same issue cited in *Employer's*. The Louisiana Appellant Court in *Hebert* stated:

> Our case does not involve settlement of a liability claim, but settlement of a passenger's casualty claim as it if were a liability claim: the passenger sought reimbursement under uninsured motorist coverage and the insurer elected on its books to treat its settlement as a liability settlement and to treat the plaintiff, its own insured, as at fault.
> *Hebert*, 409 So.2d 375 (La. App. 4th Cir. 1982).

Thus, *Hebert* did not limit the rule established in *Employer's* but to the contrary distinguished the facts before that court from those in *Employer's*.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to the Court of Appeals for the Fifth Circuit.

RESPECTFULLY SUBMITTED,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-3421

INSBROK, ET AL.,
Plaintiffs-Appellees

versus

ST. TAMMANY PARISH POLICE JURY
Defendant-Appellant

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA-88-5011-C)

(June 24, 1992)

Before POLITZ, Chief Judge, SMITH, Circuit Judge, and FITZWATER, District Judge.*

POLITZ, Chief Judge:**

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* Hon. Sidney A. Fitzwater, United States District Judge for the Northern District of Texas, sitting by designation.

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

The St. Tammany Parish, Louisiana, Police Jury appeals a summary judgment in favor of its insurers on claims for reimbursement under the deductible clauses of seven liability insurance policies. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

Titan Indemnity Company and Titan Holding Syndicate issued the liability policies at bar. Insbrok,

another Titan company, acted as a general managing agent and administered policy claims. For convenience the Titan companies and InsBrok will be referred to as Insbrok. Three policy types are involved in this suit: Type I -- Commercial General Liability; Type II -- Automobile Liability; and Type III -- Public Officials' Liability. During the policy years 1987-1990 Insbrok paid $186,416.10 on settled claims: $62,122.78, or 33%, in actual loss payments; $109,254.45, or 58%, in attorneys' fees; and $15,038.87 or 8%, in other fees or expenses. Insbrok paid these sums under its absolute contractual right to reach settlements without the permission of St. Tammany. Insbrok filed the instant diversity jurisdiction action to recover these amounts under the deductible/reimbursement clauses of the policies.

The parties consented to trial before a magistrate judge,[1] stipulated the relevant facts, and agreed that the sole issues were the legal questions of the interpretation and application of the policies to the undisputed facts. The magistrate judge found that under the deductible provisions InsBrok was entitled to reimbursement of the amounts paid on loss payments, plus attorney's fees and claim expenses. The magistrate ordered St. Tammany to pay InsBrok $95,569.23, with

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1 28 U.S.C. § 636 (c)

interest, and to pay costs. St. Tammany timely filed a notice of appeal without bond pending appeal. The magistrate judge denied the motion. On emergency motion another panel of this court granted a stay of execution pending appeal.[2]

Analysis

The standard of review for a summary judgment is well settled: We review the record *de novo* to ascertain whether any genuine issue exists as to any material fact and, upon finding none, ascertain whether the moving party is entitled to a judgment as a matter of law.[3] Without weighing the evidence, assessing its probative value, or resolving any factual disputes, we merely search the record for resolution-determinative factual disputes. In the case at bar the facts are stipulated; thus, we turn directly to the determination of whether InsBrok is entitled to a judgment as a matter of law. We review determinations of state law *de novo*.[4]

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2 See Fed.R.Civ.P. 62(f).

3 Fed.R.Civ.P. 56(c); Miles v. Amer. Tel. & Tel. Co., 703 F.2d 193 (5th Cir. 1983)

4 Salve Regina College v. Russel, 111 S.Ct. 1217 (1991).

Controlling Louisiana Legal Precepts

The magistrate judge determined that the relevant insurance provisions were unambiguous. Questions of contract interpretation and whether a provision is ambiguous both present questions of law for which our standard of review is *de novo*.[5] Under Louisiana law an insurance policy represents the law between the parties and is interpreted according to the rules of contract interpretation. If a provision is unambiguous, clear, and explicit, and its application leads to no absurd consequences, then the provision is applied as written.[6] If the contract is unambiguous but does not provide for a particular situation, Louisiana law assumes that the parties intended to bind themselves to what the law, equity, or usage regards as implied in such a contract or is deemed necessary for the contract to achieve its purpose.[7] On the other hand, an ambiguous insurance policy is construed against the insurer unless it was drafted by the insured.[8] A

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5 Cotton Bros. Baking Co., Inc. v Industrial Risk Insurers, 941 F.2d 380 (5th Cir. 1991); Houston General Ins. Co. v. Realex Group, N.V., 776 f. 2d 514 (5th Cir. 1985).

6 Sharp v. Federal Sav. & Loan Ins. Corp., 858 F.2d 1042, 1045-1046 (5th Cir. 1988); Pareti v. Sentry Indem. Co., 536 So.2d 417 (La. 1988).

7 La. Civ. Code art. 2054 (1984).

8 Lake Charles Harbor & Terminal Dist. V. Imperial Cad. & Indem. Co., 857 F. 2d 286 (5th Cir. 1988).

doubtful provision must be interpreted in light of the nature of the contract, equity, usages and the conduct of the parties before and after the formation of the contract.[9] Equity is based on the principle that no one is allowed to take unfair advantage or become enriched unjustly at the expense of another.[10] Usages are practices regularly observed in affairs of an identical or similar nature.[11] Doubts are resolved in favor of coverage.[12] A determination that there exists more than one reasonable interpretation of a disputed section of a policy is sufficient to declare that section as ambiguous. With this background, we examine the policies and the contentions of the parties.

The Type I Policy

SECTION I — COVERAGES

COVERAGE A.
BODILY INJURY AND PROPERTY
DAMAGE LIABILITY

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9 La. Civ. Code art. 2053 (1984)
10 La. Civ. Code art. 2055 (1984)
11 La. Civ. Code art. 2055 (1984)
12 Pareti supremacy.

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies. No other obligations or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENT - - COVERAGES A AND B. . . . We have the right and duty to defend any suit seeking those damages. But:

* * *

(2) We may investigate and settle any claim or suit at our discretion; and

(3) Our right and duty to defend when we have used up the applicable limit of insurance in the payment of judgments or settlements . . .

* * *

C. The damages, including claims expenses, caused in any one occurrence which would otherwise be payable under this insurance will be reduced by the deductible shown in the declarations prior to application of the LIMITS OF

> INSURANCE provisions. To settle any claim or suit we may pay all or any part of any deductible stated in this policy. If this happens, you must reimburse us for the deductible or the part of the deductible we paid.

SUPPLEMENTARY PAYMENTS -- COVERAGES A AND B

> We will pay, with respect to any claim or suit we defend:
>
> 1. All expenses we incur.
>
> A. Claims Expenses as a Part of the Deductible

Although the deductible limit is established on the Type I policy DECLARATIONS page as "$10,000 any one claim," the term deductible is not expressly defined in either the policy or endorsements.[13] Section

13 Secondary sources which purport to define a deductible clause have proved equally unilluminating. e.g., "Clause in insurance policy providing that insured will absorb first part of loss (e.g. $100) with insurer paying the excess." BLACK'S LAW DICTIONARY (6TH ED. 1991). "Many types of insurance policies have long provided that,before the insurance company pays covered losses, a fixed amount of money will be deducted." K. Syverud, The Duty to Settle, 76 Va.L.Rev. 1113, 1185 (1990).

I.A.1.a declares that the insurer will pay "those damages that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies." At first blush this would not seem to include the InsBrok claims expenses and attorney's fees because the insured is not legally obligated to pay these unless he undertakes that obligation in the insurance policy.

InsBrok relies on section I.A.1.c to support the magistrate judge's decision. A close examination of that section demonstrates the error in such reliance. Section I.A.1.c is composed of three sentences, each of which concern a separate but related matter. The first sentence is a reduction clause, providing that the "damages, including claim expenses, . . . which would be otherwise payable under this insurance will be reduced by the deductible." The second sentence permits the insurer to expend any or all of the amounts of the deductible to settle a claim or suit. The third sentence is a reimbursement provision which provides that the insured will reimburse the insurer for that part of the deductible expended in the settlements referred to in the second sentence. The policy does not contain either an express or implied definition of the deductible or claim expenses.

Deductibles have long been a routine provision in health and accident insurance policies: they rarely appeared in liability policies until the

mid-1980s.[14] Deductibles historically were employed to reduce the moral risk inherent in a first-party insurance policy. By making the insured liable for the initial dollars, the insurer drew a measure of protection against unfounded claims. Large deductibles, when combined with an insurer's right to settle, as extant in the instant policies, however, create a direct conflict between the insurer's desire to settle claims within the deductible limits (a proverbial "blank check") and the insured's desire to avoid paying a non-meritorious claim.

Leading Louisiana insurance law scholars describe a deductible as a requirement that the insured "reimburse the insurer for the first specified amount of loss."[15] We agree and conclude that a liability policy deductible clause must be specific and, unless otherwise expressly provided, is limited to reimbursement of the loss payments only. We reach this conclusion by reflecting on the traditional source of the deductible clause, the first-party insurance policy. Under first-party policies the deductible is traditionally applied to the first dollars expended by the insured on the loss. A mere claim by a first-party insurer that it is entitled to

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14 K. Syverud, The Duty to Settle, 76 Va.L.Rev. at 1185-1190.

15 S. McKenzie & H. Johnson, Insurance Law & Practice 435-436 in 15 Louisiana Civil Law Treatise (1986).

deduct its out-of-pocket costs as a part of the traditional deductible is totally without persuasive force. Thus we have no reluctance, in the absence of an express policy provision, to limit reimbursement of the deductible to the loss payments made to the claimants.

InsBrok does not invite our attention to, nor do we independently find any policy provision making claims expenses and attorney's fees part of the policy deductible. Nor is our attention invited to any dispositive authority which would compel such an expansion of the traditional concept of the deductible. Even the cases holding that the claims expenses and costs of defense may be applied against policy limits in some instances do not suggest that such expenses may be recoverable as part of the deductible.[16] We therefore hold that St. Tammany is not obligated to reimburse InsBrok for its claims expenses[17] and attorneys' fees.

Even if we assumed, *arguendo*, that InsBrok's interpretation is reasonable interpretation which favors the insured,[18] the Civil Code provides that "if doubt arises from lack of a necessary explanation that one party should have given . . . the contract must be

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16 Hartford Acc. & Indem. Co v. United General Ins. Co., 855 F.2d 228 (5th Cir. 1988).

17 We conclude, as well, that St. Tammany is not obligated to reimburse InsBrok for the $200 adjusting fee.

18 Accord, Hartford, supra.

interpreted in a manner favorable to the other party."[19] On the record before us we can only conclude that InsBrok did not explain to St. Tammany what it now claims to be the operation of the deductible clause. On the other hand, were we to conclude that the policies are silent on the question then the Civil Code directs us to "law, equity, or usage" as a guide.[20] No evidence of usage was introduced, none is identified in briefs or in oral argument, and there is no controlling law that we or the parties have found. We conclude that it would offend equity to permit InsBrok to benefit from the policy language which it drafted when it is unable to demonstrate any *quid pro quo* for the benefit it now claims to St. Tammany's detriment. Whether we view the policy as unambiguous, ambiguous, or silent, we cannot affirm the decision ordering reimbursement of the claims expenses.

InsBrok declared during oral argument that its right to seek reimbursement of the claims expenses and attorneys' fees under the deductible provisions could not have been stated clearer in the policy. Although we support and admire zealous advocacy, we cannot accept at face value this assertion of such unmistakable clarity. We perceive the very contrary.

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19 Lake Charles Harbor & Terminal Dist., supra.

20 La. Civ Code art. 2057, ¶ 2 (1984).

B. Attorneys' Fees as a Part of the Deductible

The other element of damages for which InsBrok seeks reimbursement is attorneys' fees. This is not a case where the policies are unambiguous about the reimbursement of attorneys' fees. Attorneys' fees are not mentioned except to the extent they are implicitly assumed by InsBrok as part of its duty to defend. InsBrok contends, without citation of controlling authority, that the term "claims expenses" encompasses attorneys' fees. In this they seek more than this Erie[21]-bound court can give. Under Louisiana law, attorneys' fees maybe recovered only when there is a contractual or statutory basis.[22] Even when allowed by contract or statute the fees must be reasonable.[23] InsBrok cites *Bd. of Com'rs of Port of New Orleans v. M/V Rachael Guidry,*[24] a non-Louisiana insurance law case, for the proposition that attorneys' fees need not be specifically referred to in a policy provision in order to be encompassed within a policy. That case is inapposite. In

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21 Erie R. Co, v . Tompkins, 304 U.S. 64 (1938).

22 Chambers v. NASCO, Inc., 111 S.Ct. 2133 (1991); Capital Bancshares, Inc. v. Fed. Deposit Ins. Corp., 957 F.2d 203 (5th Cir. 1992).

23 Saucier v. Hayes Dairy Products, Inc., 373 So.2d 102 (La. 1978).

24 425 F.Supp. 661 (E.D.La. 1977).

M/V Rachael Guidry, Judge Rubin held that under the provisions of the policy in question the attorneys' fees incurred by an insurer in achieving a settlement were deductible from the policy limits. Whether the attorneys' fees formed a part of or were recovered as a part of the deductible was not at issue.

We hold that because the Type I policy fails to clearly and expressly impose an obligation on the insured to reimburse InsBrok attorneys' fees, and because InsBrok offers no statutory basis for recovery of its attorneys' fees, Louisiana law compels reversal of the award of attorneys' fees.

The Type II Policy

PART IV — LIABILITY INSURANCE

> A. WE WILL PAY.
>
> 1. We will pay all sums the insured legally must pay as damages because of bodily injury or property damage to which this insurance applies. . .
>
> 2. We have the right and duty to defend any suit asking for these damages. . . . We may investigate and settle any claim or suit as we consider appropriate. Our payment of the LIABILITY

INSURANCE limit ends our duty to defend or settle.

WE WILL ALSO PAY.

* * *

4. All costs taxes to the insured in a suit we defend.

* * *

7. Other reasonable expenses incurred at our request.

The Type II policy includes a "DEDUCTIBLE LIABILITY INSURANCE" endorsement which changes the policy. Sections A, B, and C of the endorsement are reduction clauses similar to the one contained in the Type I policy. Section D provides that: "To settle any claim or suit we will pay all or any part of any deductible stated in this endorsement. You must reimburse us for the deductible or part of the deductible we paid." For the same reasons given in our analysis of the Type I policy, this endorsement provides no support for InsBrok's position on appeal. The relevant portions of the endorsement do nothing more than place in the endorsement that which the Type I policy contains internationally: the reduction clause, the right to settle clause, and the reimbursement clause. The endorsement does not define deductible or claims expenses, nor does it impose an obligation on

the insured to pay attorneys' fees. Thus, InsBrok is not entitled to reimbursement of claims expenses or attorneys' fees under the Type II policy provisions or the deductible endorsement.

The Type III Policy

PART III— WHAT THIS AGREEMENT COVERS

A. WE WILL PAY.

1. We will pay all sums the insured legally must pay as damages because of an error or omission.

2. We have the right and duty to defend any claim, suit or action asking these damages even if groundless or fraudulent. We may investigate and settle any claim or suit as we consider appropriate. Our payment of LIABILITY INSURANCE limit ends our duty to defend or settle.

3. The damages, including claims expenses, which would otherwise be payable under this insurance will be reduced by the deductible shown in the declarations prior to application of OUR LIMIT OF INSURANCE provision. To settle any

claim or suit we may pay all or any part of any deductible stated in this policy. If this happens, you must reimburse us for the deductible or the part of the deductible we paid.

B. WE WILL ALSO PAY

In addition to our limit of liability we pay for the insured:

* * *

6. Other reasonable costs incurred at our request.

For the reasons stated in our consideration of Type I and Type II policies, InsBrok has no basis for relief under the Type III policy.

Loss of Right of Reimbursement of Deductible

St. Tammany urges that *Employer's Surplus Lines Ins. v. City of Baton Rouge*[25] controls the disposition of the instant case. The Employer's court held that failure of the insurer to obtain the consent of the insured prior to entering a settlement precluded the insurer's right to recover the deductible from the insured. The policy language in *Employer's*, unlike the

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25 362 So.2d 561 (La.1978).

policy language in the instant policies, stated that the deductible applied to "all sums for which the Insured shall become legally liable." The InsBrok policies reserve the right to recover loss payments made in settlement up to the amount of the deductible. We do not believe that *Employer's* articulated a general rule of law. The decision was expressly premised upon "the provisions of the liability insurance contract (t)here[26] at issue." The only court which has considered the scope of the *Employer's* rule rejected an extension that would have placed a liability insurer's authorized settlement beyond review.[27] We therefore hold that the magistrate judge did not err in awarding InsBrok reimbursement for actual loss payments made pursuant to its absolute contractual right to settle.

Finally, we note that St. Tammany requests that we award all or part of its attorneys' fees for the proceedings below and on appeal. St. Tammany contends this right arises because InsBrok, as insurer, brought a declaratory judgment action against its insured. We do not find that the magistrate judge ruled on this request. We decline to decide the question for the first time on appeal. On remand, if St. Tammany demonstrates a legal basis for attorneys' fees the magistrate judge may award attorneys' fees

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26 Employer's, 362 So.2d at 564.

27 Hebert v. Guastella, 409 So.2d 375 (La.App. 1982).

for both trial and appellate court proceedings as are appropriate.

Conclusion

The judgment in favor of InsBrok is REVERSED as to claims expenses and attorneys' fees. The judgment in favor of InsBrok as to loss payments is AFFIRMED. The case is REMANDED for further proceedings

consistent herewith.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TITAN HOLD, INC., d/b/a INSBROK AND TITAN INDEMNITY CO.	CIVIL ACTION
VERSUS	NO. 88-5011
ST. TAMMANY PARISH POLICE JURY	SECTION "C" (2)

JUDGMENT

This matter came on for trial on a previous date.

The Court having considered the record, the evidence presented, the memoranda of the counsel and the law applicable to the case; accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment entered in favor of the plaintiffs Titan Holdings, Inc., d/b/a/ Insbrok and Titan Indemnity Company, and against the defendant St. Tammany Parish Police Jury, declaring that plaintiffs are entitled, pursuant to the provisions of the seven policies of insurance issued to the defendant policy jury by the

plaintiff, to reimbursement of the deductible portion advanced on each claim, which encompasses indemnity payments and claims expenses, including attorneys' fees.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be Judgment entered in favor of the plaintiffs Titan Holdings, Inc., d/b/a/ Insbrok and Titan Indemnity Company, and against the defendant St. Tammany Parish Police Jury in the sum of NINETY FIVE THOUSAND, FIVE HUNDRED SIXTY-NINE DOLLARS AND 23/100 ($95,569.23) DOLLARS with interest from the date of Judgment at the federal rate of interest until paid with costs to be paid by the defendant.

New Orleans, Louisiana, this 25 day of April, 1991.

/s/Michaelle Pitard Wynne
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TITAN HOLD, INC., d/b/a INSBROK AND TITAN INDEMNITY CO.	CIVIL ACTION
VERSUS	NO. 88-5011
ST. TAMMANY PARISH POLICE JURY	SECTION "C" (2)

ORDER AND REASONS

The plaintiffs Titan Holdings, Inc., d/b/a Insbrok, and Titan Indemnity Company, (Titan) filed suit against the defendant St. Tammany Parish Police Jury seeking reimbursement of monies advanced as expenses and attorneys' fees as well as loss payments made to claimants in accord with the provisions of seven policies of insurance issued to the police jury. Titan also seeks cancellation of the policies in light of the defendant's alleged breach of its obligation under the contracts.

The parties stipulated that there were no factual

disputes in the matter concerning the issue of policy coverage and submitted the issue of liability to the Magistrate for disposition. The Magistrate issued an order and reasons on October 29, 1990 in which she found as a matter of law that Titan is entitled to reimbursement of the deductible portion advanced on each claim which encompasses the indemnity payments and claims expenses, including attorneys' fees.

A hearing was held on April 25, 1991 for a determination of the amount due by the St. Tammany Parish Police Jury as reimbursement for the indemnity payments and claims expenses, including attorneys' fees, paid by Titan.

At the hearing, the parties stipulated that Titan has made indemnity payments and paid expenses, including attorneys fees, in the amount of $95,569.23, that such payments were reasonable, and that such amount was billed to the St. Tammany Parish Police Jury.

In agreeing to this stipulation, the defendant has not waived any of its defenses concerning its liability under the policy and has not agreed that it will pay the stipulated amount billed to the police jury by Titan.

The Magistrate finds the plaintiffs are not entitled to cancellation of the policies.

For, the foregoing reasons, IT IS ORDERED

that Judgment be entered accordingly.

New Orleans, Louisiana, this 25 day of April, 1991.

/s/ Michaelle Pitard Wynne
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

TITAN HOLD, INC., d/b/a INSBROK AND TITAN INDEMNITY CO.	CIVIL ACTION
VERSUS	NO. 88-5011
ST. TAMMANY PARISH POLICE JURY	SECTION "C" (2)

ORDER AND REASONS

Titan Indemnity Company is the surviving company of a merger between Titan Indemnity Company and Titan Holdings Syndicate which occurred on September 30, 1988 and therefore Titan indemnity is the "insurer" under certain policies issued to the St. Tammany Police Jury, all of which were issued either through Titan Indemnity Company or the Titan Holding Syndicate, Inc. prior to their merger. Titan Holdings, Inc., d/b/a/ Insbrok is or was the general managing agent for the other Titan entities and during periods relevant to this litigation administered certain claims

arising under the policies issued to the St. Tammany Parish Police Jury. Both Titan entities are hereinafter referred to interchangeably as plaintiffs or Titan since their interests herein appear to be identical.

The St. Tammany Parish Police Jury is a political subdivision of the State of Louisiana and the governing body of the Parish of St. Tammany.

The plaintiffs issued policies of insurance to the defendant. The plaintiffs contend that the policies provide the "deductible includes sums paid to claimant, expenses incurred by the insurer in defending a claim or suit and attorneys fees. Plaintiffs are seeking reimbursement of monies advanced as expenses and attorneys fees as well as loss payments made to claimants. The St. Tammany Police Jury contends the policies do not provide that expenses and attorneys fees are included in the "deductible".

The plaintiffs issued seven policies of insurance to the defendant consisting of three categories of insurance coverage. Counsel submitted all of the policies as evidence and earmarked the portions which each side considered to be relevant to their position. The parties stipulated that there are no facts in contest in this matter and submitted the issue of liability to the Court to be determined as a matter of law.

Three Commercial General Liability Policies were issued to the defendant, policy #DOL-03491, policy #11-CM-00044 and policy #11-CM-00366.

Plaintiffs relay of §1(c) of the Coverage section of these policies in support of their position, which sets forth as follows:

> The damages, including claims expenses, caused in any one occurrence which would otherwise be payable under this insurance will be deductibles reduced by the deductible shown in the declarations prior to the application of the LIMITS OF INSURANCE provision. To settle any claim or suit we may pay all or any part of any deductible stated in this policy. If this happens, you must reimburse us for the deductible or the part of the deductible we paid.

Defendant relies on §1(a) of Coverage A and the Supplementary Payment provision in the Commercial General Liability policies to support its position that it is not required to reimburse the insurer for its claims expenses.

These provisions provide as follows:

> 1(a). We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance

applies. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under SUPPLEMENTARY PAYMENTS - COVERAGES A AND B.

SUPPLEMENTARY PAYMENTS - COVERAGES A AND B provides in part: We will pay, with respect to any claim or suit we defend:

1. All expenses we incur.

The second type of policies at issue are the Automobile Liability policies, policy #35-BA-00268 and policy #35-BA-00022. Plaintiffs rely on an Endorsement to these policies which amended the policy to include a deductible. The endorsement provides for a Bodily Injury Deductible of $10,000.00 and a Property Damage deductible of $10,000.00.

Parts B, C and D of those policies respectively provide:

B. Bodily Injury Liability Insurance Deductible:

The damages, including loss payments and claims expenses, caused in any one accident which would otherwise be pay-

able under LIABILITY INSURANCE for bodily injury sustained by one person, in any one accident will be reduced by the Bodily Injury Per Claim Deductible stated in this endorsement prior to the application of the OUR LIMIT OF LIABILITY provision.

C. Property Damage Liability Insurance Deductible:

The damages, including loss payments and claims expenses, which would otherwise be payable under LIABILITY INSURANCE for property damage caused in any one accident will be reduced by the Property Damage Per Claim Deductible stated in this endorsement prior to the application of the OUR LIMIT OF LIABILITY provision.

D. Our Right to Reimbursement:

To settle any claim or suit we will pay all or any part of any deductible stated in this endorsement. You must reimburse us for the deductible or the part of the deductible we paid.

In support of its position, the defendant relies on language contained on page 2 of the original automobile liability policy at Part B which provides in part:

> B. WE WILL ALSO PAY:
> In addition to our limit of liability, we will pay for the insured:
>
> 7. Other reasonable expenses incurred at our request.

The last category of policies involved are the Public Official Liability Policies which are policy #15-PO-00336 and policy #DOL-03-492.

Plaintiffs rely on the language contained in Part III, §A(3) in support of its argument that they are entitled to reimbursement of expenses.

§A(3) provides:

> 3. The damages, including claims expenses, which would otherwise be payable under this insurance will be reduced by the deductible shown in the declarations prior to the application of the OUR LIMIT OF LIABILITY provision. To settle any claim or suit we may pay all or part of any

> deductible stated in this policy. If this happens, you must reimburse us for the deductible or the part of the deductible we paid.

The defendant relies on a provision similar to the one contained in the automobile liability policy which provides at PART III, §B(6):

> B. WE WILL ALSO PAY:
> 6. Other reasonable expenses incurred at our request.

Plaintiffs contend the above cited provisions unambiguously establish that the damages payable under the policy, including claims expenses, will be reduced by the deductible.

Defendant makes various arguments in support of its contention that plaintiff is not entitled to reimbursement of the claims expenses. Defendant initially argues that the holding of the Louisiana Supreme Court in the case of *Employer's Surplus Lines Insurance v. City of Baton Rouge*, 362 So2nd 561 (La. 1978) precludes plaintiffs' recovery of the claims expenses.

The pertinent provision in the policy involved in the Employer's case is the following:

> The sum of $10,000.00 shall be deducted

> from the total amount of all sums which the Insured shall become legally obligated to pay by reason of bodily injury or property damage claims . . .

The defendant contends the policies issued by plaintiff herein contains the same identical language as the Employer's policy relying on the following language contained in the Coverages section of the policies at Section I:

> 1. Insuring Agreement
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies.

A review of the clauses referred to by the defendant reveals they are not identical and that they are contained in different sections of the policies. Additionally, the Employer's policy expressly provides that the insured is only required to pay the $10,000.00 deductible upon becoming legally obligated to do so, while the deductible clauses contained in plaintiffs' policies do not contain such restrictive language conditioning reimbursement on a legally established obligation to pay.

The Supreme Court in deciding the Employer's case based its decision on a literal reading of the specific language contained in the deductible clause of that policy. Since such language is not contained in the deductible provisions of plaintiffs' policies, the holding in the *Employer's* case is not germane to this Court's interpretation of these policies.

Defendant's second argument is that the deductible clauses in the policies are ambiguous because the provision does not define the term "deductible", does not provide the conditions under which the deductible amount is to be returned and contains elements of a reduction clause. Defendant contends that the ambiguity of the clauses renders them null and therefore plaintiffs are not entitled to recover under the deductible clauses.

A review of the pre-trial order reflects defendant admitted therein that it is obligated under the policy to reimburse its insurer for indemnity payments made up to $10,000.00 per claimant. Such statement signifies defendant's recognition of the validity of the deductible clause and contradicts their position that the pertinent clauses are actually reduction clauses.

Further, contrary to defendant's argument, the policies clearly define the deductible to include loss payments and claims expenses and state that any portion of the deductible advanced in settling a claim or suit is to be reimbursed by the insured.

Defendant's next argument is that the policies contain inconsistent clauses because they expressly provide in one section that the insurer will pay all expenses incurred and such payments will not reduce the limits of insurance while stating in another section that the claims expenses will be reduced by the deductible. Defendant contends these inconsistencies create an ambiguity which must be construed against the insurer and therefore the deductible clause should not be enforced.

In *Pareti v. Sentry Indemnity Company*, 536 So2nd 417 (La. 1988), the Louisiana Supreme Court discussed the legal principles which govern the interpretation of insurance policies. The Court noted:

> An insurance policy is a contract and, as with all other contracts, it constitutes the law between the parties. *Carney v. American Fire & Indemnity Co.*, 371 So2d 815 (La. 1979). If the policy wording at issue is clear and expresses the intent of the parties, the agreement must be enforced as written. *Albritton v. Fireman's Fund Insurance Co.*, 70 So2d 111 (La. 1953).
>
> An insurance contract is to be construed as a whole, and one portion thereof should not be construed separately

> at the expense of disregarding another. *Benton Casing Service, Inc. v. Avemco Ins.*, 379 So2d 225 (La. 1979). If there is an ambiguity in a policy then that ambiguity should be construed in favor of the insured and against the insurer. *Albritton*, 70 So2d at 111. However, courts have no authority to alter the terms of policies under the guise of contractual interpretation when the policy provisions are couched in unambiguous language. *Edwards v. Life & Cas. Ins. Co. of Tenn*, 29 So2d 50 (La. 1946).

A review of the relevant provisions cited above as whole establishes the plaintiff insurer is responsible for the payment of all indemnity payments and expenses incurred in settling or defending a claim up to the policy limits, with the proviso that the insurer is entitled to the reimbursement of the $10,000.00 deductible portion advanced on each claim which includes sums advanced for claims expenses. The Magistrate finds the provisions of the policy are consistent and unambiguous and that the imposition of any other meaning to the clauses results in an alteration of the terms of the policy.

For the foregoing reasons, the Magistrate finds as a matter of law that plaintiffs are entitled to reim-

bursement of the deductible portion advanced on each claim which encompasses the indemnity payments and claims expenses including attorneys fees.

A status conference will be scheduled to discuss the trial on the issue of damages and the possibility of the settlement of this matter.

NEW ORLEANS, LOUISIANA, THIS 29 DAY OF OCTOBER, 1990.

/s/ Michaelle P. Wynne
UNITED STATES MAGISTRATE